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IN THE

Supreme Court of the United States.

No. 253. October Term, 1946.

THE UNITED STATES OF AMERICA,
Appellant.

v.

PULLMAN COMPANY, ET AL.

No. 254. October Term, 1946.

OTIS & CO.,
Appellant.

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 255. October Term, 1946.

THE CHESAPEAKE & OHIO RAILROAD COMPANY, ET AL.,
Appellants.

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 256. October Term, 1946.

GLORE, FORGAN & CO.,
Appellant.

v.

THE UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PULLMAN GROUP.

Opinions Below.

The opinion of the specially constituted district court in the original anti-trust suit (R. 726) is reported in 50 Supp. 123. The opinion on the form of judgment (R. 759) is reported in 53 F. Supp. 908. The opinion sur judgment (R. 774) is reported in 55 F. Supp. 985. The opinion upon application for approval of sale of stock of the Pullman Company (R. 1193) is reported in 64 F. Supp. 108.

Jurisdiction.

The decree of the District Court from which these appeals were taken was entered on January 4, 1946 (R. 1203). The petition for appeal of Glore, Forgan & Co., was presented and allowed on March 5, 1946 (R. 1226, 1227). The petition for appeal of each of the other appellants was presented and allowed on March 4, 1946 (R. 1206, 1209; 1220-1221; 1215, 1216).

The jurisdiction of this Court is claimed by appellants to be conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Sec. 29, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. Sec. 345. Probable jurisdiction was noted on October 14, 1946 (R. 2639).

Statutes Involved.

In addition to sections 1, 2 and 4 of the Sherman Act set out in the brief of the United States, the following statute is involved. Section 5 (1) of the Interstate Commerce Act of February 4, 1887, 24 Stat. 380 as last amended Title 49 U. S. Code par. 5 reads as follows:

> "Except upon specific approval by order of the commission as in this section provided, and except as provided in paragraph (16) of section 1 of this chapter, it shall be unlawful for any common carrier subject to this chapter, chapter 8 of this title, or chapter 12

of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition."

Additional Statement of Facts.

Although the statement of facts contained in the brief of the United States is substantially correct, there are several additional facts that should be called to the attention of this Court:

1. This proceeding was based on the contention of the United States that the railroads were the innocent victims of a Pullman monopoly. In its original opinion, the District Court said, " • • • the business about which this suit centers is not that of furnishing sleeping cars to the public, but that of supplying such cars and service incident to their operation to the railroads of the country. It is in this business that the government contends that the defendants have violated the Sherman Act" (R. 730). The Court held that the railroads were the oppressed, not the oppressors (R. 758, 726-740). The railroads were not parties to the original suit, nor were they alleged or found to be co-conspirators in the Pullman monopoly.

2. The Final Judgment of May 8, 1944, was a complete adjudication of all the issues in the case (R. 764-774). It embodied in decretal form all the points covered by the opinion, including a specific finding that the railroads were the victims of the Pullman monopoly. From this judgment the Government took no appeal. The District Court, having held that the maintenance of a pool of sleeping cars from which the railroads could draw equipment to meet seasonal and other fluctuations in travel was desirable in the public interest (R. 755), did not order the dissolution of the Pullman Company, but permitted it to continue operation under conditions designed to remove artificial restrictions on competition and to dissipate the effects of the monopolistic position which it held in the field of furnishing sleeping-car service to the railroads. This decision conformed to the views of counsel for the Government.

In order to insure a free market in the manufacture and sale of sleeping cars and end the monopolistic control

which the Court had found to exist, the Court in its final judgment enjoined Pullman-Standard and the Pullman Company from continuing or reviving any understanding whereby the Pullman Company bought sleeping cars only from Pullman-Standard and Pullman-Standard sold sleeping cars only to the Pullman Company. As a means of policing this injunction (R. 766, 1194), the Court also decreed that the operation and control of the sleeping-car business of Pullman Incorporated should be completely and perpetually separated from its car manufacturing business. The Final Judgment contained numerous provisions to insure the perpetual severance of all ties between the operating and manufacturing business.

3. To accomplish the separation the District Court had a choice of two methods: One was itself to decide which business Pullman Incorporated must part with; the other to give Pullman the opportunity to elect which business it would sell. Although the United States had urged that Pullman Incorporated be required to sell the manufacturing business, the Court in paragraph 9 of its Final Judgment, gave that corporation the right to make the election as to which business it would dispose of (R. 766). Thus the election, unappealed from, became a finality.

4. The next step following the Final Judgment was to carry out its separation provisions. The Court followed the customary practice of asking the defendant to submit within ninety days a plan for "hearings and approval" (R. 766).

5. Within ninety days from the time when the final judgment became unappealable, to wit upon October 2, 1944, Pullman Incorporated filed its election to dispose of its sleeping car business and also submitted its plan (R. 775). The plan provided, among other things, for the sale of the properties of the Pullman Company to the railroads, but did not provide for the sale of the stock of that company to them. The United States filed objections to the

plan but made no objection to a sale to the railroads (R. 900) and an extensive hearing was held thereon on March 19, 1945 (R. 1984-2021). The Court took no action on the plan, but instead, at the insistence of counsel for the Government, entered the order of March 22, 1945, authorizing Pullman Incorporated to treat with the railroads or any other prospective purchasers for the sale of the stock as well as of the assets of the Pullman Company, and directing it, after having reached an agreement of sale, to submit it to the Court for hearing and approval (R. 958). The entry of this order was preceded, on March 19th, by the following colloquy between Court and Government Counsel (R. 2000):—

"Mr. Hamilton: I think that the most satisfactory way of handling that, Judge, would be for you to give the defendants a year, or within a reasonable time. I use that because that was used in the final judgment.

"Judge Biggs: That seems reasonable.

"Mr. Hamilton: Yes, give them a year to dispose of the sleeping car business and to require the defendants to deal with those who desire to purchase this property.

"Judge Biggs: And to sell their physical assets or the stock.

"Mr. Hamilton: Or the stock. To sell all of the physical assets or part of the physical assets. I think they should be given full latitude to dispose of this business in any way they can.

"Judge Biggs: In other words, to say, in effect; at least this is your proposition; you may sell in any way that you see fit.

"Mr. Hamilton: That is right; at any price.

"Judge Biggs: At any price.

"Mr. Hamilton: To anyone.

"Judge Biggs: To anyone, so long as it is not to persons within the degrees of consanguinity, if you might call it that.

"Mr. Hamilton: Precisely. Sell the stock, sell the cars to the railroads, sell part of the cars to the railroads, sell the outstanding Pullman stock or by floating stock on the market.

"Judge Goodrich: In other words, you want them to come in with reasonable promptness with a plan for getting rid of the sleeping car business.

"Mr. Hamilton: We think that the Court should now decide and should approve a plan right now to come in with a proposal to sell the sleeping car business within a year."

The Record discloses no prior suggestion by anybody that Pullman stock should be sold to the Railroads. Up to that time the only sale contemplated was a sale of assets. The sale of stock was the Government's proposal.

Pursuant to this proposal and following the Court's order, Pullman Incorporated, on May 12, 1945, made a written offer to sell the stock of the Pullman Company to the railroads (R. 2246). This offer was subsequently opened to other prospective buyers (R. 2032).

6. While negotiations were being conducted for the sale of the operating company, Otis & Co. on August 26, 1945, intervened in the case and asked the Court to direct Pullman Incorporated to accept its offer to purchase the Pullman Company (R. 984-1003). Three other bidders, including a Railroad Buying Group consisting of substantially all of the passenger lines, also intervened and asked for similar orders with respect to their respective offers (R. 1056-1063, 1113-1141, 1141-1169). Evidence was taken on November 5 and 6, 1945, on these offers of purchase (R. 2022-2403). No one of the bidders accepted unconditionally Pullman Incorporated's offer—each of the offers was merely the basis for further negotiations.

7. Shortly after this hearing and before action had been taken on any of the bids, the Railroad Buying Group

unconditionally accepted the outstanding offer of Pullman Incorporated to sell the stock of the Pullman Company. The Group went further and agreed in writing to pay cash for the properties without taking advantage of Pullman's offer to permit a buyer to return heavy-weight cars for full credit before they were fully paid for, and other terms which might have proved burdensome to Pullman Incorporated (R. 2246, 2248). No other such acceptance had been made and the resulting contract insured a sale to a solvent purchaser at a fair price. Pullman Incorporated reported this executory contract of sale to the Court for approval (R. 1177).

8. Arguments were held on December 10, 11 and 12, 1945, on this request for approval. At these hearings in November and December all the unaccepted bids were before the Court (R. 2404-2631). The Government thereupon reversed the position that it had previously taken at the hearing in March, 1945 (R. 2000), and opposed the sale to the railroads (R. 2545, 2556, et seq.). Instead it urged the Court to require Pullman Incorporated to sell the stock of Pullman Company to Otis & Co. (R. 2557).

9. At the hearing in November 1945 it was developed that in the previous November the Director of the Office of Defense Transportation had advised the president of the Pullman Company that at a conference between representatives of the Department of Justice, the Office of Defense Transportation, the Army and the Navy, it had been determined that there should be no interruption to the existing plan of operation of Pullman cars during the emergency (R. 2277-2278). No party questioned the existence of the emergency or that it would continue for a considerable period. Because of economic conditions, no cars suitable for civilian travel had been built during the war (R. 2056-7, 2082). The existing fleet which had shrunk to approximately five thousand cars (R. 2391) excluding tourist cars and troop sleepers, had had hard usage during the war and

many of the cars were rapidly reaching the end of their useful life (R. 2057). The capacity of manufacturers to replace or supplement this fleet with new cars did not exceed three cars per day (R. 2064). Many military forces still remanied to be moved, and the pent-up desire of civilians to travel was in evidence. Based on what happened following the last war, it was evident that civilian traffic would be heavy for several years (R. 2957, 2078). In order that the fullest use might be made of existing cars it was essential that they be operated in a pool by one company for a considerable time rather than be dispersed among different operators (R. 1198).

10. The plan of the railroads for acquiring and operating the Pullman Company was set forth in their memorandum agreement dated October 18, 1945 (R. 1161-1169, 1182-1185). This contemplated two periods of operation: First, an emergency period during the transition between war and peace ending not later than December 31, 1948 (known as "the interim period") and, second, the period after the emergency is over and enough cars are available safely to permit their dispersal among the different operators. The plan further contemplated that at the end of the interim period the purchasing group will dispose of their interest to an independent operator.

11. The railroads will pay in round figures $75,000,000 for the Pullman Company, divided roughly as follows: $35,000,000 for lightweight cars, $20,000,000 for heavyweight cars, and $20,000,000 for miscellaneous fixed properties for inventories and for working capital (R. 2254). Individual railroads have already purchased the lightweight cars (R. 2047). Under the railroad plan all participating railroads will receive non-transferrable notes of the Pullman Company payable in heavyweight cars assigned to their railroads. They will also receive stock in the company representing the depreciated value as of December 31, 1945, of the fixed and miscellaneous properties and the floating pool

consisting of about twenty per cent of the heavyweight cars (R. 1165). The yearly depreciation on heavyweight cars including regular tourist cars amounts to approximately $4,500,000 per year (R. 2255). The depreciation on fixed properties amounts to about $400,000 per year (R. 2255). From this it appears that at the end of the three year interim period of operation which will expire on December 31, 1948, the investment of all of the railroads in the stock of the Pullman Company will represent only $20,000,000.

12. On December 18, 1945 the District Court in an opinion by Goodrich, J. announced the approval of the contract (R. 1193 et seq.).

13. On December 26, 1945 the District Court entered an interim order which *inter alia* authorized the Pullman Company to make and complete sales of lightweight sleeping cars to the railroads (R. 1202-3).

14. On January 4, 1946 the Court entered an order approving the contract of sale to the Railroad Buying Group (R. 1203-1205), and from that order, implementing the final judgment, these appeals have been taken.

Summary of Argument.

Foreword.

From the moment when Pullman Inc. was given the choice whether to quit the manufacturing business or the sleeping car business it has been persistently endeavoring to withdraw from the latter. The most obvious method of withdrawal was by out-and-out sale of its assets. Following the insistence of Government counsel that there should be a sale within a limited time of either stock or assets to the railroads or anybody else and pursuant to an order of court to that effect, Pullman Inc. made to the Railroads and thereafter to all potential buyers a definite offer to sell one or the other. While several tentative and conditional bids for the stock were made by interveners, the unconditional and unqualified acceptance by the Purchasing Group of railroads (for the use of all railroads desiring to participate) automatically resulted in an executory contract of sale. After consideration of every phase of the situation, including the protest of the Government against the very policy which it had advocated, the District Court exercised its discretion by approving the contract as a completely effective method of terminating the Pullman monopoly. It is from this administrative order that the pending appeals have been taken.

I.

Since the order just referred to merely implemented the Final Judgment of May 8, 1944 from which nobody appealed and since it is quite obvious that a sale to the railroads will effectively end the Pullman monopoly, this Court is faced by the same sort of preliminary question as would be raised by a motion to dismiss or affirm. Pullman Inc. accordingly submits, as if in support of such a motion, that the order of January 4, 1946 was not appealable and that the District Court would have exceeded its power had it passed upon the economic questions raised by the inter-

veners and had decided by anticipation the question whether the purchasers' plan of operation may result in a violation by the railroads of the anti-trust laws.

II.

On the merits, Pullman Inc.'s vital interest in upholding the only firm and favorable contract of sale which it is sure of making leads it to suggest five reasons why the order of the District Court should be affirmed. In so doing Pullman Inc. proceeds upon the theory that the only question open on appeal is whether the District Court abused its discretion either by failing to order a sale to one of the interveners or by deciding that the railroad plan of operation did not involve a restraint of commerce.

1.

In the court below the several would-be purchasers, and particularly Otis & Co., tried unsuccessfully to induce the Court to evaluate glittering representations of superior service and to exercise the sort of broad jurisdiction which a chancellor might exercise in a corporate reorganization where all sorts of conflicting interests must be adjusted. The Court kept steadily in mind the proposition that this is *not* a reorganization proceeding but merely a forced sale of corporate property which, if consummated, would completely destroy the monopoly the destruction of which was the Court's responsibility. In discharging this responsibility the Court by no means failed to consider the views of the several would-be purchasers. Their assertion to the contrary is answered by the record of the proceeding before the District Court. It is simply a case in which each disappointed bidder considers it a judicial error not to hand over the property to him.

2.

Because the operation of the sleeping car business as a cooperative enterprise almost necessarily involves a pool-

ing agreement, the railroads have properly asked the Interstate Commerce Commission to approve this feature of their plan. If, as is indicated by the report of its examiners, the Commission determines the pooling feature to be in the public interest, this Court may well conclude that the other features of the contract call for no exercise of its supervisory jurisdiction.

3.

In any event, it is submitted that a sale to the railroads on the terms of the existing contract would create no illegal monopoly of the sleeping car business. Such restrictions on commerce as will exist until December 31, 1948 (the end of the "interim period") are made necessary merely to insure an operation during the emergency which is desired by every department of the federal government except the Department of Justice. They are incidental to cooperative management and involve no threat to the public interest. When the time presently comes for the railroads to sell to an independent contractor the reserved jurisdiction of the court below will suffice to insure complete compliance with the Final Judgment.

4.

A realistic view of the consequences of separation of the sleeping car business from the manufacturing end must, we submit, lead this Court to conclude that there will be no perpetuation of the manufacturing monopoly which is found to have been enjoyed by Pullman Inc. Already competitive forces are at work. The Pennsylvania Railroad and the New York Central alone are spending $40,000,000 in buying sleeping cars from companies equipped to build them.

5.

The suggestion that sinister influences will be exerted by banks and insurance companies is based merely upon

inveterate suspicion and not upon any substantial facts. The argument based upon this suspicion finds no support in the Record. It is built upon the basis of an exhibit to the brief of Otis & Co., a disappointed bidder, which consists of an ex parte statement made in another connection by counsel representing the Government in this very suit. It is respectfully suggested that an argument of this type supplies no reason for reversing the order appealed from.

Argument.

I.

THE ORDER ENTERED JANUARY 4, 1946, WAS NOT APPEALABLE.

The Pullman Group of appellees respectfully suggests to the Court that the order of January 4, 1946, which approved the sale of Pullman stock and assets to the Railroad Buying Group, respondents herein, is not appealable, and that the proceedings brought to this Court by the appellants present no substantial basis for appellate consideration. Formal motions to dismiss or affirm were contemplated by the Pullman Group of appellees, but it was thought sufficient, instead of a motion, to include a statement of our position in this brief.

Concisely stated, our position is this: The final decree of May 8, 1944, granted Pullman Inc. the right to elect to dispose of either its manufacturing business or sleeping car business. The Government did not appeal from that decree. Pullman, in full compliance with the decree, elected to dispose of its sleeping car business and retire therefrom. Thereafter, after hearing, by an order dated March 22, 1945, and as suggested by the Government, the Court authorized and directed Pullman Inc. to negotiate for a sale of Pullman stock and assets to the railroads, among others. Thereafter, acting directly under the order referred to, Pullman negotiated a sale to the railroads, and this sale, the District Court, after hearing, approved; and it is this order of approval which is made the basis of the present appeals. We submit that the failure of the Government to appeal from the final decree, which gave Pullman the election to dispose of its sleeping car interests, coupled with the failure of the Government to object to, or seek a review of, the order of March 22, 1945, directing Pullman to negotiate a sale to the railroads, not only estopped the Government from seeking a review here, but, necessarily,

left the further proceedings in the trial court wholly administrative and discretionary, and, as such, not subject to appeal or review by this Court. The approval of the disposal of Pullman stock and assets to the railroads, in support and execution of the final decree and of the order of March 22nd, both of which are in full force and effect, presents no substantial question for the consideration of this Court.

In connection with the question of the appealability of the order of Jan. 4, 1946, the Court is requested to consider what was the proper limit to the power of the District Court to pass, by anticipation, upon the possibility that the plan of the purchasers for operating the property may be so carried out as to involve a violation of the Anti-Trust Laws. It will not be overlooked that in this lawsuit the sole objective was the destruction of the Pullman monopoly. Since the railroads have never had their day in court, not having been joined as defendants, the Court may well be of opinion that this litigation is not a suitable medium for adjudicating the legality of the purchaser's plan for using what they are buying. When once it was conceded, or found, that the Pullman monopoly would be ended by the present sale, Pullman Inc. submits that the power of the District Court was exhausted. While it is a dangerous thing to challenge the power of the Supreme Court, it may at least be suggested that the possible application of the anti-trust laws to the plan of the purchasing railroads can well be postponed until experience has demonstrated whether or not there is a real evil to be remedied. If the District Court was not under obligation to consider the possible future illegality of the operation of the Railroad plan all basis for the arguments of the appellants disappear and an affirmance or dismissal becomes inevitable.

It is accordingly submitted that these appeals should be dismissed, or in the alternative, that the order below be affirmed.

II.

THE ARGUMENT ON THE MERITS.

If the Court is of opinion that the order of January 4, 1946 is appealable and that it is the function of the Court presently to consider the possible invalidity of the Railroad plan under the anti-trust laws, then the only open question is whether the District Court abused its discretion either by refusing to order a sale to some other intervenor or by approving a sale to the Railroads pursuant to a plan alleged to be illegal.

Pullman Incorporated has a vital interest in sustaining, upon the merits, the approval of its favorable contract of sale since it has no assurance that in the event of a reversal it will still be able to sell its properties on terms as advantageous as those agreed upon with the Railroad Buying Group. We accordingly now submit the several considerations which should lead the Court to affirm the judgment of the District Court.

1.

There Is No Merit in the Contention That the Court Erred by Failing to Evaluate the Proposals Made by the Various Bidders.

In its opinion of December 18, 1945, 64 F. Supp. 108 (R. 1193-1199), the District Court pointed out that the separation of the sleeping car and manufacturing businesses of Pullman Incorporated was not an end in and of itself, but merely a final step in the proceeding to break up the Pullman monopoly; that the main objects had been accomplished in the Final Judgment; and that the separation was merely a by-product of that judgment—"a means of policing to insure compliance with the decree." It further stated that its responsibility was discharged by seeing to it that the sleeping car business was disposed of in a manner which carried out its Final Judgment; that when a buyer who had the necessary qualifications was produced

and approved by it, the Court was not required to go further and determine the best way of conducting the sleeping car business for the benefit of the country at large. The Court thought that its task was to strike down the monopolistic practices which it found to exist, and leave it to competitive business, freed from monopoly, to take advantage of the freedom to profit itself and benefit the public.

Having satisfied itself that, by the terms of the Final Judgment and the additional terms to be imposed in the order confirming the sale, competitive conditions had been fully restored, it said it was under no duty to decide the relative economic merits of the plans proposed by the various proponents for the future conduct of the sleeping car business. A determination of that question, the Court said, called for business judgment which it was the function of the businessman and not of the Court to exercise. The Court pointed out that by compelling a separation between the manufacturing business and the sleeping car business, as it had done in its Final Judgment, control of the sleeping car business had been restored to the railroads, where it would have rested long ago had it not been for the Pullman monopoly, and that it was therefore up to them as the proprietors of the business to make the decision. Their decision was embodied in the plan which was then under consideration. The Court, after thorough study of its provisions, concluded:

> "That buyer [the Railroad Group] * * * comes in under terms which we are satisfied are in accordance with the judgment of this Court." (R. 1199.)

The conclusion of the District Court was sound. In *United States v. Columbia Gas and Electric Company,* 36 F. Supp. 488, the Court said:

> "In addition, the City of Detroit objects to the approval of the plan and urges that the plan of divestiture should follow substantially the second of the alternatives sought by the Government in its supple-

mental pleading, i. e., by causing Columbia Oil to divest itself of ownership of all stock of Panhandle Eastern. The question before the Court, however, is not the relative merits of two plans of divestiture. The question is simply whether the plan before the Court is adequate to meet the requirements for relief under the antitrust laws."

The Court's answer to the charges of monopoly made by the appellants was as follows (R. 1197):

> "We see no danger for the perpetuation of monopoly in a railroad owned sleeping car business."

Notwithstanding the fact that the District Court properly held that it was not its duty to weigh the respective merits of the various bidders, it did do exactly that. The Court said (R. 1195-6):

> "The railroads are the natural and obvious people to do sleeping car business. They are the ones who own the rails on which the cars are drawn; it is their locomotives which pull sleeping cars as well as coaches and freight cars. It is the railroads' obligation to furnish the sleeping car service. This we think to be a point of highest importance in this connection."

Again (R. 1199):

> "That buyer is, as we said above, the most natural purchaser, because it has the legal responsibility for providing sleeping cars * * *."

Thus, the question of whether appellants' theory of the duty of the Court is correct is immaterial, since the Court did what they claim it should have done.

2.

Objections Based Upon the Operation of the Sleeping Car Business by the Railroads as a Cooperative Enterprise Present Administrative Questions to Be Determined by the Interstate Commerce Commission Under Section 5 (1) of the Interstate Commerce Act.

None of the parties objects to the sale of the stock of the Pullman Company, as such, in carrying out the portion of the Final Judgment which requires the separation of the business of operating sleeping cars from that of manufacturing sleeping cars. The objection arises because the railroads propose to conduct the sleeping car business as a cooperative enterprise during the interim period. If the railroads had elected to divide up the facilities of the Pullman Company and each operate its own sleeping car business, no one could argue that a new monopoly violative of the Sherman Act had resulted (R. 2485). In fact, the Final Judgment specifically provides that individual railroads shall have the right to purchase sleeping car equipment from the Pullman Company, and otherwise facilitates and protects their right to operate and furnish their own service (R. 764, 769-771).

The Final Judgment (Par. 31, R. 772) provides:

> "Nothing in this judgment contained shall be construed as depriving the Interstate Commerce Commission of its jurisdiction over contracts between carriers under Section 5 (1) or other provisions of the Interstate Commerce Act."

As was stated in *Atlantic Greyhound Corp.-Pooling*, 37 M. C. C. 543, 550; with respect to this portion of the Act:

> "To come within the provisions of the paragraph, the arrangement between the carriers must provide for a pooling or division of traffic, to which each participating carrier contributes, and in the revenues from

which each shares according to some agreed formula otherwise than according to individual performance."

It may be interesting to note that in 1929 through an analogous operation, the nation's express business, after getting the approval of the Interstate Commerce Commission, was taken over by a railroad owned corporation, Railway Express Agency Inc. and has since been so operated by such railroad group. *Securities and Acquisition and Control of Railway Express Agency Inc.*, 150 I. C. C. 423.

See also *Express Contract*, 1920, 59 I. C. C. 518, 521.

The Memorandum Agreement of the Railroad Buying Group provides that each participating railroad will purchase the lightweight cars assigned to its lines. Under it railroads may also purchase heavyweight cars from the Pullman Company. These cars, together with any new cars acquired by the railroads, will, during the interim period, be leased to the Pullman Company for operation by it on their respective lines (R. 1165-6). During this period the Pullman Company will furnish sleeping car service on the owning railroads, and will renew present sleeping car agreements with such modifications as shall be necessary to conform to the Final Judgment (R. 1166, 89, 597). For example, see Southern Pacific agreement (R. 508-523).

The railroads will thus operate the sleeping car business as a joint enterprise through ownership of the Pullman Company, to which their individually owned cars will have been leased (R. 1161-69). The sleeping car revenue of all participating railroads will be collected by the Pullman Company, and not by the individual railroads which haul the cars that they own or in which they have an interest through ownership of the Pullman stock. The gross sleeping car earnings of each railroad will then be determined. The cost of operation will not be determined directly by operating cost on the line involved, but on the basis of the average cost of operating cars of a given class on all the railroads of the country on which the Pullman

Company operates (R. 517). The difference between the gross earnings and the operating cost will, after the deduction of a charge for the owner of the cars, be divided between the Pullman Company and the railroad on a percentage basis (R. 515-518).

In addition to a division of sleeping car revenue which a railroad will receive from operation on its own line the earnings of the Pullman Company will presumably be distributed by the declaration of dividends on the stock of the company to the participating railroads.

From the foregoing it is evident that the distribution to individual roads of revenue from joint sleeping car operations will not be in accordance with their performance, but by a formula agreed upon between parties. The plan is therefore a pooling arrangement.[1]

It follows that since the Interstate Commerce Commission has jurisdiction of the proposed railroad operation of the Pullman Company during the interim period under Section 5 (1) of the Interstate Commerce Act (49 U. S. C. Title 49 Sec. 5) the propriety of such operation is an administrative question which both under the law and under the Final Judgment has been entrusted to the Commission.

The Buying Group of Railroads have applied to the Commission for approval of the proposed method of operation of the sleeping car business, and the proceeding has been assigned Commission number 29592. If the pooling arrangement is approved by the Commission, as has been proposed by its examiners (See Traffic World, February 8, 1947, pp. 389-90) the plan of the railroads for operating the Pullman Company can immediately be put into effect. If

[1] Another element that is usually considered essential to a pooling arrangement is competition between the parties. *Pullman Company and Canadian National Railway Co. et al.*, 259 I. C. C. 41. This Court knows that in furnishing sleeping car accommodations the railroads are strongly competitive; for example, in operating the Liberty Limited and the Capitol Limited to and from Washington, and the Broadway and the Century to and from New York.

it does not approve the plan as submitted, the railroads will no doubt be able to adjust their method of operation to meet the administrative views of the Commission.

In these circumstances, all the objections of appellants in this case which are based upon operation of the Pullman Company by the railroads as a cooperative enterprise are without merit. If, however, the court does not accept the views above expressed, then the following argument becomes relevant.

3.

A Sale to the Railroad Buying Group Would Not Create a Monopoly in the Furnishing of Sleeping Car Service.

(a) *The Final Judgment was designed to permit the operation of the Pullman sleeping car business by the railroads or by an independent operator or operators freed of the restraints found to have been unlawful.*

In framing its decree the Court had before it a comprehensive record of the ways and means by which Pullman had maintained what the Court termed a stranglehold on the railroads with respect to furnishing sleeping car service. These methods are set out clearly in the original opinion of the District Court (R. 726-744). The Court also had in mind that the purchaser of the Pullman Company might well be the railroads. This was mentioned as one of the alternatives to the monopolistic service offered by the Pullman Company in its original opinion (R. 734). The United States had in proceedings with respect to the Final Judgment tried unsuccessfully to get the Court to prohibit a sale to the railroads (R. 2548), and one of the members of the Court in a dissenting opinion had pointed out that in all probability no one else could be found to buy it [2] (R. 761-763). In fact Judge Biggs at the hearing on

[2] Judge Biggs who wrote this dissent later joined in the opinion of December 18, 1945, approving the sale to the Railroad Buying Group (R. 1193).

December 11, 1945 emphasized the fact that the Government has not appealed from the Final Judgment (R. 2548-2552). The provisions in the Final Judgment were therefore designed to permit the free play of normal competitive forces in the conduct of a sleeping car business under railroad as well as under other ownership of the sleeping car company.

The essential difference between the plan of the Railroad Group and the plans of appellants lies in a different concept of the proper function to be performed by a sleeping car company in the economy of the railroads. The appellants insist that the railroads and the public would be best served by a single sleeping car company which would furnish to the railroads and service for them all of their sleeping car requirements. On the other hand, the plan proposed by the Railroad Group contemplates ownership by the individual railroads of such of their sleeping cars as are required to fulfill their normal requirements and the furnishing by the sleeping car company of only such cars as are required to meet seasonal or other fluctuations of business on their several lines. While not required by the Railroad Group plan, it is probable that the various railroads will choose to obtain the servicing of their cars from the sleeping car company.

The arguments made by appellants in favor of a single sleeping car company which would furnish all of the sleeping car service to the railroads of the country, parallel closely the arguments made by the Pullman Group in their unsuccessful defense of the Government's charge of monopoly. With all of these arguments the District Court was familiar. That Court evidently was convinced that competitive conditions could more nearly be restored by returning the sleeping car business initially to the railroads and allowing the free play of competitive forces to determine the future course of the sleeping car business.

The economic theories upon which appellants base their arguments are unsound. First, it is unrealistic to speak

of competition between a railroad and the sleeping car company which it employs to perform a service for it. Secondly, even if it were economically feasible for the sleeping car company to render equal and non-discriminatory service to all of the railroads of the country, the effect would be to stifle rather than to promote competition. In advancing these theories, appellants entirely overlook the essential fact that it is the railroads which are in competition with one another for the patronage of the public.

In addition to requiring that the ownership and control of the sleeping car business of Pullman Incorporated be completely and perpetually separated from its car manufacturing business, the Court struck down the exclusive dealing provision in the operating contracts of the Pullman Company whereby that company reserved the sole right to furnish all cars and services on the railroads for a term of years (R. 771). It added many mandatory provisions designed to make it easy for individual railroads to secure their own cars and render their own sleeping car service in whole or in part, or to secure cars and services from other sources.

The Pullman Company was required as long as it remained in business, and where cars were involved, to the extent that it had available cars: (1) to sell used cars to any railroad with which it had a contract for furnishing, or for furnishing and servicing sleeping cars (R. 769); (2) to operate railroad-owned or controlled sleeping cars built by any manufacturer (R. 770); (3) to operate, or to furnish and operate, sleeping cars, even though sleeping cars were being furnished or operated, or furnished and operated, on other lines of the same railroad by the railroad or by a third party (R. 770); (4) to furnish and operate sleeping cars from its floating pool to meet the whole or part of the peak or seasonal demands of a railroad even though the railroad secured no other service from the Pullman Company (R. 770); and (5) to furnish and operate cars needed by a railroad to provide its quota for the opera-

tion of joint through service in connection with other railroads (R. 771).

In the order appealed from the Court made all of these provisions binding on future purchasers of the stock or assets of the Pullman Company and added other restrictive provisions (R. 1203-1205). The Court reserved ample jurisdiction to change or supplement its decree (R. 773).

These provisions give an individual railroad the fullest opportunity and freedom to acquire or experiment with new cars, to render service or secure it from other companies, to supplement its own service by joining other railroads in establishing through routes, and to use Pullman service or cars to the extent, and only to the extent, that it may desire. At the same time they remove the possibility of any artificial restrictions on any car manufacturer that may want to compete for the business. Appellants do not show how ownership of the stock of the Pullman Company by the Railroad Buying Group as distinguished from ownership by others [3] could affect this situation.

Appellants do not suggest any additional safeguards but simply take the position that nothing the Court could do would justify control of the operating company by all or by a large group of railroads. The position of the Government in this respect is far from impressive, because the Court below imposed more stringent provisions under the new ownership than those suggested by Government counsel when he was insisting that Pullman Incorporated treat with the railroads looking to a contract for the sale of the stock as well as of the assets of the Pullman Company.[4]

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[3] The most vocal of those making this contention represent or advocate the cause of Otis & Co., which is very closely affiliated with a small but powerful group of railroads (R. 2035-2036, 2038, 2079, 2080).

[4] Apparently having in mind that the railroads would purchase the stock or assets of the Pullman Company, the Government in its objections to proposed plan of separation, Section II, paragraphs 1, 2 and 5 (R. 902-903) did not

(b) ***The operation of the Pullman Company by the railroads during the interim period between war and peace will be consistent with the Final Judgment and the transportation emergency that exists.***

In their plan of operation during the interim period the Railroad Buying Group made one concession to the transportation emergency. They provided that all sleeping cars owned or acquired by the participating railroads should be leased to and operated by the Pullman Company.

This temporary method of operation provides the groundwork for a considerable portion of the argument of appellants that the railroad plan would result in a new monopoly.

Nobody has denied the fact that in order to make fullest use of existing cars it is essential during the transition period that they be operated in one pool by one company. Most of the parties to the proceedings are agreed that this is necessary (R. 2476, 7, 2509).

The individual railroads will during this period buy from manufacturers of their own choosing any additional cars needed on their lines, and competition in respect of new and improved cars and accommodations will be unrestricted.

Certain facts in the sleeping car business minimize the importance of the provision of the railroad plan that during the emergency all cars owned or acquired by the railroads must be leased to the Pullman Company. Necessarily, the number and "consist" of trains on which such

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ask the Court to make paragraph 28 of the Final Judgment (R. 772) which prohibited common directors and officers between the Pullman Company and the railroads binding upon the purchaser. The Court, however, made this paragraph of the Final Judgment, as well as all other provisions thereof, binding upon the Pullman Company or anyone who might acquire its assets, and for good measure added certain additional restrictive provisions of its own (R. 1203-1205, 1197).

service is offered, the time of their departure and arrival, the handling of trains, the heating of cars, and, to a large extent, miscellaneous services at terminals, the furnishing of ice and water enroute, the making of reservations and selling of tickets, have always been and from a practical standpoint must be under the sole control of the railroads (R. 2224, 749, 754, 1195-6, 89-597).

The real opportunity for effective competition between different operators is in the furnishing and maintenance of new and different cars and accommodations, an opportunity which is not only preserved, but given impetus, under the railroad plan during the interim period by placing the primary responsibility of furnishing new equipment on individual railroads (R. 2530, 2486, 2523).

In giving its approval to the plan that sleeping cars during the interim period must be leased to the Pullman Company for operation, the Court was properly exercising its discretion to mould its action to meet the exigencies of a temporary situation.

(c) *The larger railroads will not cause the Pullman Company to discriminate against the smaller roads in furnishing equipment and service.*

The argument of the appellants on this point will at the end of the interim period, lose the weight, if any, which it now has. Even as applied to the interim period it is no more than plausible.

The Final Judgment requires the Pullman Company to furnish cars and service to railroads under reasonable and non-discriminatory terms (R. 769-771). Discrimination in the furnishing of cars and service cannot be practiced covertly. All operating agreements must be filed with the Interstate Commerce Commission and their terms are open to public inspection (49 USCA 6 (5) and 16 (13)). The Attorney General has the right under the Final Judgment to examine the records of the Pullman Company and to interview its employees touching any matter having to do with obedience to the order of the District Court (R.

772). The Pullman Company is an Illinois corporation (R. 1236) which has fifteen directors (R. 1238). Because of the cumulative voting provisions of the Illinois constitution and Corporation Act, railroads owning as little as 7% of the stock could have a representative on the Board of Directors, to look after their interests and keep them informed of what was going on in the operation of the property. See *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707; *People v. Cohn*, 339 Ill. 121, 171 N. E. 159. The Government or any aggrieved railroad will have a complete and effective remedy by applying to the Court for the enforcement of its decree. See *Associated Press v. United States*, 326 U. S. 1.

Apropos of this contention the District Court said in its opinion of December 18, 1945 (R. 1199), "We also know that if any one of the partners in the cooperative enterprise starts to play fast and loose with one of its associates, this Court is open to a suitor who claims that our decree is not being complied with."

(d) *There is no reason to doubt that the railroads will cause the Pullman Company to abide strictly by the terms of the Final Judgment.*

If anything more is needed there are other reasons why the unsupported assertion of appellants that railroad ownership will create a new monopoly in the sleeping car business is untenable. In making it appellants necessarily assume that the railroads will flout or attempt to circumvent the decree of the Court. There is not the slightest reason to believe this is true, since the railroads were the victims, not the perpetrators of the offense against the Sherman Act.

Appellants' contention is also based upon the premise that the power of the lower court to enforce its orders is inadequate. Such a contention wholly disregards the fact that contempt proceedings are direct, expeditious and highly persuasive.

4.

The Monopoly Long Enjoyed by Pullman-Standard in the Manufacture of Sleeping Cars Will Not Be Perpetuated When the Railroads Acquire the Stock of the Pullman Company.

The monopoly ended when the Court in its Final Judgment enjoined Pullman-Standard and the Pullman Company from continuing or reviving any understanding whereby the Pullman Company bought cars only from Pullman-Standard (R. 1199, 768), and decreed that the operation and control of the sleeping car business of Pullman Incorporated should be completely and perpetually separated from its car manufacturing business (R. 766).

The effectiveness of the separation was further assured by other provisions of the Final Judgment designed to prevent any direct or indirect circumvention of it. (Final Judgment, paragraphs 6, 7, 8, 12, 14, 15, 16, 17, 18, 20, 27, 32; R. 766-772). In addition, in the order appealed from, the Court further provided, "That no person shall be at the same time a director of Pullman Incorporated or of any vendee participating railroad, or of Pullman-Standard and of any such railroad, or of Pullman, Inc. and of Pullman Company, or of Pullman Company and of Pullman-Standard" (R. 1204).

The Court went further. By striking down the exclusive dealing clause in the Pullman Company contracts and requiring that company to service any railroad owned or controlled sleeping cars, it increased the potential number of buyers of sleeping cars and effectively prevented a seller's monopoly (R. 770, 771).

Any doubt that might otherwise exist that the Judgment of the Court and the subsequent sale by Pullman Incorporated of its sleeping car business has not dissipated the effects of the monopoly is now removed by the requirement in the order appealed from that the railroads having any interest in the Pullman Company shall acquire all of their sleeping cars by competitive bidding under rules

similar to those established by the Interstate Commerce Commission under Section 10 of the Clayton Act, 15 U. S. C. Ann. § 20 (R. 1204). *Regulations Relative to Bids of Carriers*, 56 I. C. C. 847. Although the Government suggested this provision as a safeguard to destroy the Pullman manufacturing monopoly (R. 2552, 3), it now claims that the railroads could circumvent it by the preparation of specifications that only one manufacturer could meet. The District Court found, however, that there were no basic patents on sleeping cars and that any company equipped to manufacture railroad passenger cars could build sleeping cars. It also named the companies that were able and willing to do so (R. 753-4).

Furthermore, the railroad plan, which contemplates the purchase of new sleeping cars by individual railroads (R. 2530, 2486, 2523), is designed to accelerate the spreading of orders for sleeping cars among existing car builders much more rapidly than if the buying power were concentrated largely in one company, as contemplated by one and possibly by the other of the two bidders who have appealed (R. 2050, 2108). Under the railroad plan there will be some fifty railroads in the market for new cars instead of only one sleeping car company. Even now normal competitive forces are at work in this field, and large orders for new sleeping cars have already been placed by the railroads with various car manufacturers. The Pennsylvania and the New York Central alone have already ordered four hundred sleeping cars, which will cost some $40,000,000 from companies equipped to build such cars. The Sante Fe is buying forty-nine lightweight sleeping cars; the Burlington, D. & R. G., and Western Pacific sixty; and the Northern Pacific, Great Northern, and Burlington fifty; and the M. K. & T., and Frisco have ordered two lightweight sleeping car trains (R. 2545-47, 2616-17, 2198, 2527). Numerous other sleeping cars have been ordered by the railroads (R. 2306, 2063).

5.

The Argument of Certain Appellants That the Final Judgment Will Be Ineffective Because of the Banker and Insurance Company Connections of the Railroads and the Pullman Group of Companies Is Only Specious.

The Court took cognizance of all relevant evidence with respect to interlocking directorates and other relationships between the railroads and the Pullman companies that might interfere with the carrying out of its decision, and in its Final Judgment prohibited (a) the Pullman Company or its successors from having directors or officers in common with any railroad offering sleeping car service to the public (R. 772); (b) Pullman Incorporated or Pullman-Standard from having directors, officers, agents or employees in common with the Pullman Company or persons controlling that company (R. 768); and (c) a corporation owning or controlling either the Pullman sleeping car business or the Pullman manufacturing business, and the principal officers and directors of such corporation, from owning any of the securities of any corporation owning or controlling the other business (R. 767-8).

In the order appealed from the Court further provided that no person should be at the same time a director of Pullman Incorporated or of any vendee railroad, or of Pullman-Standard and of any such railroad, or of Pullman Incorporated or Pullman-Standard and the Pullman Company. A vendee railroad was defined as including a railroad which owned or controlled any of the stock of the Pullman Company or the stock of any corporation to which any of the stock of the Pullman Company or any corporation to which the assets or business of the Pullman Company, or any substantial portion thereof, might be sold or transferred (R. 1204).

Nevertheless certain appellants argue that the railroads and the Pullman group are so connected with and dominated by certain large banking concerns and insurance companies that complete and effective separation between

the Pullman Manufacturing group and the sleeping car company and the railroads will be impossible. They do not deny that railroad investment companies and banks are necessary to railroad financing, but still insist that the Court take judicial notice of which are good and which are bad financial organizations, and deny the Railroad Buying Group the right to acquire the stock of the Pullman Company on the ground that some of their banking connections are in the latter category. On the other hand these appellants insist that the bidders they favor are free from any such taint.

The only evidence in the record on this subject is that some of the directors of Pullman Incorporated and of some of the railroads are also directors of certain large banks and insurance companies. There is also evidence that Otis & Co. and the Young group of railroads helped persuade the Interstate Commerce Commission, in the face of opposition from certain railroads and bankers, that railroad securities must be sold by competitive bidding (R. 2052-3), an accomplishment which, incidentally, has gone far toward destroying the influence, if any, that insurance companies or banks may formerly have had in railroad management.[8] The Court below correctly held that the record did not inform it of the operations of railroad bankers nor of the existence of any war between them, and that it would be beyond proper judicial process for it to speculate about such matters (R. 1199).

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[8] Since competition was introduced, Otis & Company and an associated company have done more than 50% of the railroad financing of the country (R. 2588).

CONCLUSION.

We submit that for the reasons heretofore stated these appeals should be dismissed or the order of the District Court approving the sale to the Railroad Buying Group should be affirmed.

Respectfully submitted,

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